# United States
# Circuit Court of Appeals
## For The Ninth Circuit

LEROY POWERS, (otherwise known as ROY POWERS),
*Plaintiff in Error,*
vs.
THE UNITED STATES OF AMERICA,
*Defendant in Error.*

No. 4047

## Brief of Defendant in Error

*Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division.*

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### STATEMENT OF THE CASE.

The plaintiff in error was convicted under the Second Count of an indictment charging a conspiracy, with other defendants named therein, in violation of Section 37 of the Penal Code. The indictment, the sufficiency of which is not challenged, contained four counts. Each count is set forth in detail in the brief of the plaintiff in error, but for convenience in considering the same, the substance thereof is herein stated.

COUNT 1. Charges that the defendants conspired to commit acts made crimes by the National Prohibition Act by procuring and causing to be procured intoxicating liquor for the purpose of possessing, selling, bartering, exchanging, giving away and furnishing the

same; and that in furtherance and in pursuance of said conspiracy the defendants performed the following overt acts:

1. Concealed on July 26, 1922, twenty cases of intoxicating liquor.

2. Stole twenty cases of intoxicating liquor on July 27, 1922, from Joseph H. Frankel and Henry Dapper.

3. Possessed on July 27, 1922, twenty cases of intoxicating liquor.

COUNT II. Charges that the defendants conspired to commit acts made offenses by the National Prohibition Act by aiding, abetting and counselling certain persons engaged in the unlawful transportation of liquor, to transport intoxicating liquor from the Dominion of Canada into the United States, particularly into Ferry County, Washington; and that in furtherance of said conspiracy the said defendants performed the following overt acts:

1. Assisted, aided and abetted in the transportation of ten cases of intoxicating liquor from the Canadian boundary line to Republic, in Ferry County, Washington, on May 24, 1922.

2. Assisted, aided and abetted in the transportation of fifteen cases of intoxicating liquor from the Canadian boundary line to Republic, Ferry County, Washington, on July 10, 1922.

3. Assisted, aided and abetted in the transportation of twenty cases of intoxicating liquor from

the Canadian boundary line to Republic, Ferry County, Washington, on July 28, 1922.

COUNT III. Charges that the defendants conspired to commit acts made offenses by the Act of Congress of March 3, 1917, (39 Stats. 1069) known as the Reed "Bone Dry" Amendment, by aiding, abetting and counselling certain persons engaged in the unlawful transportation of liquor, to transport intoxicating liquor in interstate commerce from the State of Washington into other states; and in furtherance of said conspiracy said defendants performed the following overt act:

1. Assisted, aided and abetted Joseph H. Frankel in transporting and causing to be transported ten cases of intoxicating liquor known as Canadian whiskey from Republic, Ferry County, Washington, to Portland, Oregon, on May 25, 1922, via the Great Northern Railway Company and connecting railways.

COUNT IV. Charges that the defendants conspired to commit acts made crimes by the Act of Congress of March 3, 1917, (39 Stats. 1069) known as the Reed "Bone Dry" Amendment, by aiding, abetting and counselling certain persons engaged in the unlawful transportation of liquor to transport intoxicating liquor in interstate commerce from the State of Washington into other states; and in furtherance of said conspiracy the defendants performed the following overt act:

1. Assisted, aided and abetted Joseph H. Frankel and Henry Dapper on July 10, 1922, in transporting and causing to be transported in interstate commerce fifteen cases of intoxicating liquor from Republic, Ferry County, Washington, to Pocatello, Idaho, via the Great Northern Railway Company and connecting railways.

## ASSIGNMENT OF ERRORS.

Five separate and distinct errors are assigned by the plaintiff in error, but the only question raised by such assignments of error is whether the indictment charges separate and distinct crimes which can not be joined as separate counts in one indictment. This question was raised by the plaintiff in error in the trial court, first: by motion to quash the indictment, or in the alternative, to require the Government to elect as to whether trial would proceed under Counts I and II or under Counts III and IV of the indictment; and, second: by a motion in arrest of judgment.

## ARGUMENT.

It will be noted that Counts I and II each charge a conspiracy to commit acts made crimes by the National Prohibition Act and that Counts III and IV each charge a conspiracy to commit acts made crimes by the Reed "Bone Dry" Amendment. The plaintiff in error contends that conspiracies charging the commission of crimes, as defined in these two laws, can not be joined. The crime charged against the defendant in each count of the indictment is the crime of conspiracy, in

violation of Section 37 of the Penal Code, which reads as follows:

> "Section 37. If two or more persons conspire either to commit an offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Section 1024, Revised Statutes, provides for joining in one indictment in separate counts two or more acts or transactions connected together, or two or more acts or transactions of the same class of crimes or offenses. Section 1024, R. S., reads as follows:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases the court may order them to be consolidated."

Can it be said that the several counts of this indictment does not charge "acts or transactions of the same class of crimes or offenses?" Can it be said that a conspiracy to commit acts made offenses by one act of Congress is a different class of crime than a conspiracy to commit an act offending some other act of Congress? Particularly so, where the conspiracies relate to offenses under acts of Congress covering similar subjects? In this case it will be noted that all the conspiracies involve transactions in intoxicating liquor.

The nature of the offense (a conspiracy) is certainely the same, the offense relates to the same subject matter, the same rules of evidence apply and the penalty imposed upon conviction must be the penalty provided under Section 37 of the Penal Code, regardless of the penalty which may be provided for by the act for the violation of which the conspiracy was formed.

Counsel for plaintiff in error apparently fail to observe that the conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. This has been repeatedly declared by the Supreme Court of the United States:

> *United States v. Rabinowich*, 238 *U. S.* 78, 85;
> *Callan v. Wilson*, 127 *U. S.* 540, 555;
> *Clune v. United States*, 159 *U. S.* 590, 595:
> *Williamson v. United States*, 207 *U. S.* 425, 447;

If this be true, then all conspiracies must be of the same class of offenses and the distinction between the various crimes that are the object of the conspiracies cease to exist. In discussing the provisions of Sec. 37 of the Penal Code, the Supreme Court in the case of United States v. Hirsch, 100 U. S. 33, states:

> "The conspiracy here described is a conspiracy to commit any offense against United States. The fraud mentioned is any fraud against them. It may be against the coin, or consist in cheating the Government of its lands or other property. The offense may be treason and persons have been convicted under this statute for a conspiracy to do the acts which constitute treason against United States."

In the case of United States v. Britton, 108 U. S. 199, 204, Mr. Justice Woods, speaking for the Court, said:

> "The offense does not consist of both the conspiracy and the act done to effect the object of the conspiracy, *but of the conspiracy alone.*"

Again, in the case of Dealy v. United States, 152 U. S. 439, the Court declared:

> "The gist of the offense is the conspiracy."

Furthermore, a single conspiracy might have for its object the violation of two or more of the criminal laws, the substantive offenses having perhaps different periods or limitations. This fact is recognized by the Supreme Court in United States v. Rabinowich, 238 U. S. 78, 86 in which case the court cites Joplin Mercantile Co. v. United States, 236 U. S. 531, for an instance of a conspiracy with manifold objects.

It follows, therefore, that if the conspiracy was not a different offense from the crime that is the object of the conspiracy, then a conspiracy having for its object the commission of acts made crimes by different laws, could not be charged in one indictment, which the court has declared may be done.

The plaintiff in error cites the case of McElroy v. United States, 164 U. S. 76, as sustaining his position. The case has no application and can not be likened to the instant case. The reason for holding that the indictments could not be consolidated in the McElroy case is succinctly stated by the Supreme Court in the case of Williams v. United States, 168 U. S. 382, 390:

> "The inquiry in that case, (McElroy v. United States), was 'whether counts against five defendants can be coupled with a count against part of them, or offences charged to have been committed by all at one time can be joined with another and distinct offense committed by part of them at a different time.' It was held that the statute did not authorize that to be done. The Chief Justice, speaking for the court, said: 'It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried'."

Again, the case of the United States v. Cadwaller, 59 Federal 677, is cited by counsel for plaintiff in error which case also has no application here. The indictment in that case was held bad for the reason that each count thereof charged three distinct crimes. The question of whether the counts had been properly placed in one indictment was not considered.

It is contended by counsel for plaintiff in error that the indictment in the case at bar does not show on its face that the counts refer to acts or transactions connected together. The evidence which showed that the conspiracy charged in Counts III and IV was a further conspiracy flowing out of and directly following the conspiracy charged in Counts I and II, is not before the Court. However, a perusal of the various counts will show that the various conspiracies charged are connected together and were part of the same transaction. Count II alleges as an overt act the assistance of the defendants in transporting ten cases of liquor from the Canadian boundary line to Republic, in Ferry

County, Washington, on May 24, 1922; and Count III alleges as an overt act the assistance of the defendants in causing the transportation in interstate commerce of ten cases of intoxicating liquor from Republic, in Ferry County, Washington, to Portland, Oregon, on May 25, 1922.

Again, Count II alleges as an overt act the assistance of the defendants in the transportation of fifteen cases of intoxicating liquor from the Canadian boundary line to Republic, in Ferry County, Washington, on July 10, 1922—and Count IV alleges as an overt act the assistance of the defendants in causing the transportation of fifteen cases of intoxicating liquor from Republic, in Ferry County, Washington, to Pocatello, Idaho, on July 10, 1922.

It clearly appears, therefore, that all of the same defendants are charged in Counts III and IV with a conspiracy to ship in interstate commerce the same quantity of liquor on the same date from the same place that they are charged in Count II with assisting in bringing to the place from which the interstate transportation commences. These facts make the case at bar quite analagous to the case of Pointer v. United States, 151 U. S. 396, in which the court held an indictment good which charged two separate and distinct murders committed on the same day, in the same county and district and with the same kind of instrument.

The court in the case of Pointer v. United States, just cited, emphatically announced the principle that

Sec. 1024 R. S. leaves to the discretion of the court the determination of whether in a given case a joinder of two or more offenses in one indictment against the same person is consistent with the settled principles of criminal law. In stating this principle, the court said:

> "While recognizing as fundamental the principle that the court must not permit the defendant to be embarrassed in his defence by a multiplicity of charges embraced in one indictment and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different felonies, at least of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer or upon motion to quash or on motion in arrest of judgment, and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect upon what one of the charges he will go to trial. The court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor. That discretion has not been taken away by section 1024 of the Revised Statutes. On the contrary, that section is consistent with the settled rule that the court, in its discretion, may compel an election when it appears from the indictment, or from the evidence, that the prisoner may be embarrassed in his defence, if that course could not be pursued."

In the instant case it certainly can not be said from the face of the indictment that the plaintiff in error was embarrassed in his defense by having Counts III and IV joined in the same indictment with Counts I and II. It is also evident that the trial court, exercising the discretion referred to in the case last cited, did not consider from the evidence that the plaintiff in error had been so embarrassed in his defense for the reason that the motion of the plaintiff in error for a directed verdict and his motion in arrest of judgment were both denied.

Furthermore, it does not appear from the decisions that it is essential for the indictment to show on its face that the transactions are connected together in order to prevent the court from requiring the Government to elect on which count or counts of an indictment it will proceed to trial where more than one offense is charged.

In Pointer v. United States, 151 U. S. 396, the court refers at page 402 to the case of Regina v. Trueman, 8 Car & P. 727, as follows:

> "For instance, in Regina v. Trueman, 8 Car & P. 727, which was an indictment for arson, containing five separate counts, each charging the firing of a house of a different owner, it appeared from the opening by the prosecutor that the houses in question constituted a row of adjoining houses, and that the fire was communicated to four of them from the one first set on fire. As the burning of each house was a distinct felony, the prisoner asked that the prosecutor be put to his election. Erskine, J., said: 'As it is all one transaction, we must hear the evidence, and I do

> not see how, in the present stage of the proceedings, I can call on the prosecutor to elect. I shall take care that, as the case proceeds, the prisoner is not tried for more than one felony. The application for a prosecutor to elect is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, and may, therefore, be likely to embarrass the prisoner in his defence'."

It is evident from the foregoing language of the court that the indictment in the case of Regina v. Trueman did not show upon its face that the various counts charging the crime of arson were connected together or part of the same transaction, but the trial court, upon the opening of the prosecution, determined that they were closely connected together and refused to require the Government to elect as between the several counts.

## SUMMARY.

Counts I and II charge a conspiracy to commit offenses made crimes by the National Prohibition Act. Counts III and IV charge a conspiracy to commit offenses made crimes by the Reed "Bone Dry" Amendment. The gist of the crime in each count is the conspiracy. Each conspiracy is the same class of crime. The overt acts set forth in the various counts show by comparison that they were part of the same transaction and connected with each other in pursuance of the conspiracies charged. Such conspiracies may be joined under Sec. 1024 R. S. in one indictment in separate counts.

It is submitted, therefore, on behalf of the Government that no error was committed by the trial court in refusing to quash the indictment, or in refusing to require the Government to elect as to whether it would proceed to trial on Counts I and II or Counts III and IV of the indictment.

The judgment should be affirmed.

Respectfully submitted,

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